REMARKS

I. GENERAL

Claims 1-29 are pending in this application. Claims 1, 11, 18, and 22 have been amended herein. Claims 1-29 stand rejected. The issues raised in the Non-Final Office Action of January 25, 2010 ("*Current Action*") are as follows:

- Claims 1-10 and 23-24 are rejected under the judicially created doctrine of obviousness-type double patenting;
- Claims 1, 4-7, 11-14, and 17-28 are rejected under 35 U.S.C. 102 (e) as being anticipated by U.S. Patent No. 6,611,506 to Huang et al. (hereafter *Huang*); and
- Claims 2-3, 8-10, and 15-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Huang* in view of U.S. Patent No. 4,794,635 to Hess (hereinafter *Hess*); and
- Claim 29 is rejected under 35 U.S.C. 103(a) as being unpatentable over Huang in view of well-known prior art (MPEP 2144.03).

In response, Applicant respectfully traverses the outstanding claim rejections and requests reconsideration and withdrawal in light of the remarks presented herein.

II. TELEPHONE INTERVIEW

On June 23, 2010, a telephone discussion was held between the Examiner, Sayed Zewari, and Applicant's representatives, Robert Greeson (Registration No. 52,966) and Huyen Luong (Registration No. 61,052). Applicant would like to express appreciation to the Examiner for his time and consideration in conducting the interview. Applicant respectfully submits this summary of the substance of the interview in accordance with M.P.E.P. §713.04.

During the discussion, Applicant's representative and the Examiner discussed the cited reference *Huang* with respect to claim 1. While no agreement was reached regarding patentability, the Examiner expressed to Applicant's representatives possible areas disclosed in Applicant's specification that were not taught by the cited references.

III. AMENDMENTS

Claims 1, 11, 18, and 22 have been amended. Support for this amendment can be found at, *e.g.*, paragraphs [0044]-[0045], [0053], [0058]-[0061], and [0074]-[0078] of the specification. As such, no new matter has been added.

IV. DOUBLE PATENTING REJECTIONS

Claims 1-10 and 23-24 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-21 of U.S. Patent No. 6,751,444. Applicant proposes filing a Terminal Disclaimer upon an indication that the pending claims are allowable if the double patenting rejection still stands, thereby obviating such a double patenting rejection.

V. REJECTIONS UNDER 35 U.S.C. § 102

Claims 1, 4-7, 11-14, and 17-28 are rejected under 35 U.S.C. § 102(e) as being anticipated by *Huang*. "A claim is anticipated ***only if*** each and every element as set forth in the claim is found, either expressly or inherently, described in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of* California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987) (emphasis added). Moreover, "[t]he ***identical invention*** must be shown in as complete detail as is contained in the . . . claim." *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989) (emphasis added). Because the hallmark of anticipation is prior invention, an anticipating reference must not only disclose all claim limitations within the four corners of the document, but must also disclose those limitations arranged or combined in the exact same way as in the claim. *Net MoneyIn v. Verisign*, Opinion in Case Number 2007-1565, pp. 15-16 (Fed. Cir. October 20, 2008) (*citing Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983)).

1. Independent Claim 1

Claim 1 discloses a process for "allocating carriers in a multi-carrier system comprising determining a location of a subscriber with respect to a base station" (emphasis added). The

Examiner appears to point to *Huang*'s Figures 1 and 2, col. 4 lines 52-53, and col. 6 lines 10-15, as satisfying this limitation. *See* Current Action, pg. 9. Further, the Examiner appears to also rely on inherency to satisfy this limitation. *See id.* at 2 ("*Huang* inherently track [sic] the locations of the subscribers within the network. For example, for billing purposes the location of the subscriber must be known so that the network can determine the call origin and destination.") (emphasis added).

First, Applicant respectfully points out that "[i]n relying upon the theory of inherency, the Examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art." *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original); M.P.E.P. § 2112. It is unclear whether the Examiner is referring specifically to *Huang*'s communication systems or generally to all communication systems. As such, the Examiner failed to comply with the requirements for raising an inherency rejection because the Examiner has not shown that the allegedly inherent characteristic necessarily flows from the teaching of *Huang*.

Further, the limitation requires "determining a location of a subscriber with respect to a base station" (emphasis added). Even if Applicant agrees with the Examiner, which Applicant does not, the Examiner has only shown that Huang's system determines a subscriber's location for billing purposes. This assertion, even taken as true, is still wholly silent as to the relationship between the billing location of the subscriber and a base station. Therefore, Huang fails to satisfy all limitations of claim 1.

In *Huang*, there is no determining a subscriber's location with respect to a base station. Instead, *Huang* allocates a carrier based on how much load there is on that carrier rather than the distance between a subscriber and base station. Although *Huang* mentions a border carrier that serves a subscriber station located at an outer periphery of a coverage area, this is merely a description of the border carrier's function and not a location requirement in order for the subscriber to be assigned to the border carrier. In fact, when *Huang*'s system determines that a transferee-candidate carrier is at a border carrier, the system adjusts the threshold load level to

favor selecting the border carrier without considering the subscriber's location because, according to *Huang*, the border carrier tends to have better radio frequency coverage and performance. *See Huang*, col. 7 lines 48-50, and col. 9 lines 10-20. Accordingly, *Huang* does not disclose determining a location of a subscriber with respect to a base station, as recited by claim 1. Therefore, *Huang* fails to teach all limitations of claim 1.

Further, claim 1 recites "selecting carriers from a band of multi-carriers to allocate to the subscriber according to the location of the subscriber with respect to the base station." The Examiner again points to *Huang*'s Figures 1 and 2, col. 4 lines 52-53, and col. 6 lines 10-15, and *Huang*'s multi-carrier selector **18** as satisfying this limitation. *See* Current Action, pg. 9. Further, as best understood, the Examiner appears to take official notice that "hand off, among other things, depends on location of subscriber," i.e., the Examiner has not cited to specific portions of *Huang* or some other references as support. Applicant respectfully points out that "[i]t would not be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known (emphasis added.)" M.P.E.P. §2144.03. Under Rule 37 C.F.R. §1.104(d)(2), the Examiner is hereby requested to provide and make of record an affidavit setting forth his data as specifically as possible for the assertion. Alternatively, under M.P.E.P. §2144.03, the Examiner is hereby requested to cite a reference in support of the assertion. Otherwise, the rejection of claim 1 should be withdrawn.

Further, as discussed above, *Huang* is concerned with allocating traffic between multiple carriers based upon the measured load for each carrier. *See Huang*, Abstract, col. 2, lines 40-43. Indeed, *Huang*'s multi-carrier selector **18** is described as only selecting a carrier for a subscriber requesting access based on a comparison between the load level of a first carrier and the load level of a second carrier. *See Huang*, col. 4, lines 52-55; and col. 6, lines 10-15, Abstract. Further, one of ordinary skill in the art would know load is independent of distance, *e.g.*, a high load does not correlate to a close subscriber just as a low load does not correlate to a far away subscriber, or vice versa. Accordingly, neither the cited portion nor the complete text of *Huang* discloses the claim 1 recitation of selecting carriers "according to the location of the subscriber with respect to the base station." Therefore, *Huang* fails to teach all limitations of claim 1.

Claim 1, as amended, further recites "indicating to the subscriber whether or not to adjust transmit power to above its normal transmit power range based, at least in part, on the selected carriers allocated to the subscriber" (emphasis added). The Examiner asserts that *Huang*'s load measurer **14** discloses this limitation. *See* Current Action, pg. 9. The Examiner has failed to address the arguments Applicant presented in the Response to the Non-Final Office Action dated July 22, 2008. As such, Applicant can only address this rejection by presenting the previously presented arguments in substantially the same form.

As previously discussed, *Huang*'s load measurer, as its name indicates, simply measures the load of each carrier, which is characterized by *Huang* as the current downlink or uplink power of simultaneous base station transmissions based upon the active traffic channels of each carrier. *See Huang*, col. 4, lines 4-8, and 13-19. There is no indication in *Huang* that the load measurer is even capable of communicating with the subscriber, let alone indicating to the subscriber whether or not to adjust transmit power to above its normal transmit power range based, at least in part on the selected carriers allocated to the subscriber as required by claim 1. Moreover, *Huang* is not at all concerned with the transmit power of the subscriber because its main goal is to determine, at the base station, which of the carriers is appropriate to assign to a subscriber based on the carriers' measured load, as measured by the base station. Accordingly, *Huang* fails to teach all limitations of claim 1. Therefore, Applicant requests withdrawal of the rejection of record.

Further, claim 1, as amended, recites "adjusting a power control setting for the subscriber at the base station; and assigning a spectral priority code to the subscriber based on whether the subscriber is near or far from the base station, wherein the spectral priority code assigned to a subscriber far from the base station is higher in priority than the spectral priority code assigned to a subscriber near the base station, and wherein carrier allocation occurs based on the spectral priority code." *Huang* does not disclose the recited limitations. Accordingly, *Huang* fails to teach all limitations of claim 1. Therefore, Applicant requests withdrawal of the rejection of record.

2. Independent Claim 11

Claim 11, as amended, discloses an apparatus comprising a carrier allocator to determine spectral priority based on information gathered from access requests sent by subscriber units and a power control unit coupled to the carrier allocator to indicate a power control range for each of the subscriber units, wherein said power control range is based, at least in part, on said determined spectral priority. The Examiner has failed to address the arguments Applicant presented in the Response to the Non-Final Office Action dated July 22, 2008. As such, Applicant can only address this rejection by presenting the previously presented arguments in substantially the same form.

The Examiner cites portions of *Huang* that disclose only the allocation of a carrier. *See* Current Action, pg. 9; *Huang*, col. 10, lines 59-61. At the Examiner's citations, there is no mention in *Huang* of spectral priority based on information gathered from access requests sent by subscriber units (*e.g.,* time delay or path loss, *see* Current Specification, paragraphs [0073]-[0078]), let alone a carrier allocator that can determine such priority. Instead, *Huang*'s system receives a subscriber's request, measures the load level of the call-originating carrier and transferee-candidate carrier, and determines whether the subscriber remains on the call-originating carrier or is subject to a hand-off. *See Huang*, Figures 2, 3, 6, 7A, and 7B. This process occurs in the order that a request is received without consideration to whether a subscriber has priority over other subscribers in being assigned to a carrier in the coverage area, *i.e.*, the spectrum. *See Huang*, col. 3 lines 57-65. Accordingly, *Huang* does not disclose a carrier allocator that determines spectral priority based on information gathered from access requests sent by subscriber units. Therefore, *Huang* fails to teach at least this limitation of claim 11.

Further, *Huang* fails to disclose a power control unit coupled to the carrier allocator to indicate a power control range for each of the subscriber units, wherein said power control range is based, at least in part, on said determined spectral priority. The Examiner appears to assert that *Huang*'s load measurer **14** discloses this limitation. *See* Current Action, pg. 9. However, as discussed above, *Huang*'s load measurer, as its name indicates, simply measures the load of each

carrier, *i.e.*, current downlink or uplink power of simultaneous base station transmissions based upon the active traffic channels of each carrier. *See Huang*, col. 4, lines 4-8, and 13-19. Even though *Huang*'s load measurer may be capable of measuring power from overhead channels and traffic channels, *Huang*'s load measurer is simply not a power control unit coupled to the carrier allocator to indicate a power control range for each of the subscriber units as set forth in the claim. Instead, *Huang* is mainly concerned with the base station measuring the carriers' load level and not with the subscribers, let alone indicating a power control range for each of the subscriber units. Accordingly, *Huang* fails to teach all limitations of claim 11. Therefore, Applicant requests withdrawal of the rejection of record.

3. Independent Claim 18

Claim 18, discloses a method comprising the subscriber receiving an indication of carriers selected based on distance of the subscriber from the base station in relation to other subscribers, the carriers for use in communicating with a base station. The Examiner asserts that the selection of an appropriate carrier described by *Huang* satisfies this limitation. *See* Current Action, pgs. 9-10. Also, the Examiner again asserts that "hand off, among other things, depends on location and thus the distance of subscriber," without citing to a specific portion of *Huang* or any other reference. *See id.* at pg. 3. It is unclear whether the Examiner is referring to Huang's system specifically or all communication systems in general. As best understood, the Examiner is taking Official Notice that hand off in Huang's system, among other things, depends on location and thus the distance of subscriber. Under Rule 37 C.F.R. §1.104(d)(2), the Examiner is hereby requested to provide and make of record an affidavit setting forth his data as specifically as possible for the assertion. Alternatively, under M.P.E.P. §2144.03, the Examiner is hereby requested to cite a reference in support of the assertion. Otherwise, the rejection of claim 18 should be withdrawn.

Further, Applicant respectfully reiterates that *Huang*'s selection of a carrier is based on whether the load level of a first carrier is greater than a second carrier (*see Huang*, Figure 2 (S18,

S22, and S24), col. 6, lines 6-18). In fact, there is no mention in *Huang*, at the Examiner's citations, regarding the subscriber's location with respect to the base station or in relation to other subscribers. Accordingly, *Huang* does not disclose the subscriber receiving an indication of carriers selected based on distance of the subscriber from the base station in relation to other subscribers, the carriers for use in communicating with a base station, as recited by claim 18. Therefore, *Huang* fails to teach all limitations of claim 18.

Moreover, claim 18, as amended, recites "the subscriber receiving a command from the base station to use either a normal or extended power control range based, at least on, the location of the subscriber in relation to the base station and the carriers allocated to the subscriber." As discussed above, there is no indication in *Huang* that the load measurer is even capable of communicating with the subscriber, let alone communicating a command based on the location of the subscriber in relation to the base station and the carrier allocated to the subscriber. Therefore, *Huang* fails to teach all limitations of claim 18.

4. Independent Claim 22

Claim 22, as amended, recites comparing interference caused by an operating channel to adjacent channels with output power of one or more subscribers wherein the interference comprises leakage power. The Examiner cites to the abstract, Figure 2, column 5 lines 57-67, and column 6 lines 6-17 of *Huang* as satisfying this limitation. *See* Current Action, pg. 12. Further, the Examiner appears to also rely on inherency to satisfy this limitation. *See id.* at 3. ("*Huang* disclose [sic] selecting a carrier from amongst carriers and this inherently involves comparison") (emphasis added).

First, Applicant respectfully points out that "[i]n relying upon the theory of inherency, the Examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art." *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original); M.P.E.P. § 2112. The Examiner failed to comply with the requirements

for raising an inherency rejection because the Examiner has not shown that the allegedly inherent characteristic necessarily flows from the teaching of *Huang*.

Moreover, as construed by the Examiner, *Huang* allegedly discloses "comparison" "amongst carriers" while claim 22 requires comparing (1) interference to adjacent channels with (2) output power of one or more subscribers. Accordingly, even if Applicant agrees with the Examiner, which Applicant does not, *Huang* still does not satisfy all the limitations of claim 22.

Further, although *Huang*'s abstract states that "[t]he carrier assignment of the subscriber depends upon a predetermined threshold, which preferably considers actual or estimated differential interference between the first carrier and the supplemental carrier," *Huang* does not disclose this claim's step of comparing interference to adjacent channel leakage power with output power of a subscriber. The cited portions of *Huang* do not discuss or mention adjacent channel leakage power or output power of a subscriber, let alone comparing the interference to the adjacent channel leakage power caused by the output power of a subscriber. Instead, *Huang* discloses determining the predetermined threshold, which is used to decide whether a hand-off occurs, based upon comparing the interference level of a first carrier (*e.g.*, "per carrier," *see Huang*, col. 8 lines 23-28) as compared to the interference level of a second carrier. *See Huang*, col. 8, lines 29-37. Accordingly, *Huang* does not disclose comparing interference to adjacent channel leakage power with output power of a subscriber. Therefore, *Huang* fails to disclose at least this limitation of claim 22 and thus, fails to teach all limitations of claim 22.

Further, claim 22, as amended, recites "selectively allocating one or more carriers of a band to the one or more subscribers in ~~a~~ the multi-carrier system based on results of the comparison of the leakage power to adjacent channels and the output power, wherein one or more subscribers closer to the base station are allocated carriers closer to the band edges of the operating channel and one or more subscribers further from the base station are allocated carriers near or at the center of the band of the operating channel." The Examiner has failed to address the arguments Applicant presented in the Response to the Non-Final Office Action dated July 22, 2008. As such, Applicant can only address this rejection by presenting the previously presented arguments in substantially the same form.

The Examiner appears to assert that *Huang* discloses this limitation by describing a carrier allocation procedure based on the load levels (*e.g.*, interference within the carrier) of the call-originating carrier and the transferee-candidate carrier, which is measured by the base station subsystem, wherein the call-originating and transferee-candidate carriers serve different geographic regions with at least one overlap in which the subscriber is located. *See* Current Action, pgs. 12-13; *Huang*, Abstract, col. 1, lines 55-60, col. 5, lines 57-67, and col. 6 lines 6-18. As discussed above, *Huang* allocates carriers based on the difference between the measured load levels of a first carrier and a transferee-candidate carrier and not on the results of comparing the adjacent channel leakage power to the output power of a subscriber, as recited by claim 22. Moreover, *Huang* is not concerned with whether a carrier is near or at the center of the operating channel or closer to the band edges. Instead, *Huang* is concerned with determining whether the call originating carrier can handle the subscriber or an inter-carrier is necessary to hand-off the subscriber to the transferee-candidate, regardless of where in the operating channel the carrier is at. Thus, *Huang* fails to disclose this limitation.

Moreover, claim 22, as amended, recites "sending an indication to the one or more subscribers to use an extended power control range if the allocated carriers are at or near the center of the band of the operating channel." *Huang* does not disclose this limitation. Accordingly, *Huang* fails to teach all limitations of claim 22. Therefore, Applicant requests withdrawal of the rejection of record.

5. Dependent Claims 4-7, 12-14, 17, 19-21, and 23-28

Each of dependent claims 4-7, 12-14, 17, 19-21, and 23-28 inherits the limitations of the claims from which they depend. As shown above, *Huang* does not satisfy every limitation of the independent claims. Accordingly, the dependent claims are allowable at least for the reasons set forth above with respect to the independent claims. Moreover, dependent claims 4-7, 12-14, 17, 19-21, and 23-28 set forth limitations making them patentable in their own right.

For example, dependent claim 4 recites "calculating a time delay and a path loss associated with the subscriber." The Examiner cites col. 1, lines 55-67 of Huang as satisfying

this limitation. *See* Current Action, pg. 10. Further, the Examiner asserts that "Huang discloses in the cited section a time out which is calculating delay of the response." *See* Current Action, pg. 4.

However, as Applicant previously pointed out, the cited portion in *Huang* discusses a problem with existing technology in that the base station may enter a "time out" period while it waits for a response or transmission from the subscriber because the subscriber's transmit power level may be too weak to compensate for higher interferences. *Huang*, col. 1, lines 55-67. As explained by *Huang*, this timeout period may cause delays in *Huang*'s system due to weak transmit level. A delay is simply not the same as calculating the delay itself. Further, there is no mention in *Huang* of calculating a path loss. If the Examiner continues to assert that *Huang*'s system actually calculates the delay while it is experiencing the "time out" due to weak signal, Applicant respectfully requests the Examiner to cite to specific portions of *Huang* that explains this. Otherwise, under Rule 37 C.F.R. §1.104(d)(2), the Examiner is hereby requested to provide and make of record an affidavit setting forth his data as specifically as possible for the assertion. Alternatively, under M.P.E.P. §2144.03, the Examiner is hereby requested to cite a reference in support of the assertion. Accordingly, *Huang* fails to disclose calculating a time delay and a path loss associated with the subscriber, as recited by claim 4. Therefore, Applicant requests withdrawal of the rejection of record.

Moreover, claim 4 recites "determining transmit power requirements for the subscriber based on the time delay and the path loss." The Examiner has failed to address the arguments Applicant presented in the Response to the Non-Final Office Action dated July 22, 2008. As such, Applicant can only address this rejection by presenting the previously presented arguments in substantially the same form. The Examiner relies on the same portion of *Huang* (col. 1, lines 55-67) as satisfying this limitation. *See* Current Action, pg. 10. As discussed above, *Huang* describes a problem with existing technology that may cause a base station to enter a "time out" period, waiting for a response or transmission from the subscriber. A base station being in "time out" due to lack of subscriber activity is not the same as determining transmit power requirements for the subscriber based on the calculated time and delay and path loss of the

subscriber. Accordingly, *Huang* fails to disclose at least this limitation of claim 4. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 6 recites "sending a command to the subscriber to use either a normal or extended power control range based on carrier allocation." The Examiner has failed to address the arguments Applicant presented in the Response to the Non-Final Office Action dated July 22, 2008. As such, Applicant can only address this rejection by presenting the previously presented arguments in substantially the same form. The Examiner relies on *Huang*'s Figure 2, col. 5 lines 57-67, col. 6 lines 6-17, as satisfying this limitation. As discussed above, *Huang* is not concerned with the subscriber, except that it gets assigned to a carrier. There is no discussion at all in *Huang* of the subscriber using a normal or extended power control range, letting alone commanding it to do so based on carrier allocation. As shown, *Huang* fails to disclose this claim limitation. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 7 recites "adjusting a power control setting for the subscriber at the base station." The Examiner has failed to address the arguments Applicant presented in the Response to the Non-Final Office Action dated July 22, 2008. As such, Applicant can only address this rejection by presenting the previously presented arguments in substantially the same form. At the Examiner's citation, *Huang* states the "base station subsystem **24** adjusts the predetermined threshold prior to selecting the transferee-candidate carrier." *See* Current Action, pg. 11, *Huang*, col. 7, lines 64-67. Despite the same use of the word "adjust," the base station of *Huang* is changing the predetermined threshold of differential interference programmed at the base station, which is a different action than "adjusting a power control setting for the subscriber," as recited by claim 7. *Huang*, col. 4, lines 57-67, col. 7, lines 64-67, and col. 8, lines 24-28. Accordingly, *Huang* fails to disclose adjusting a power control setting for the subscriber at the base station. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 12 recites "the carrier allocator allocates carriers at edges of a band to the nearest subscribers," and claim 13 recites "the carrier allocator classifies subscribers into priority groups and allocates carriers to each of the subscribers based on the priority group in which each of the subscribers resides." The Examiner has failed to address the arguments Applicant presented in

the Response to the Non-Final Office Action dated July 22, 2008. As such, Applicant can only address this rejection by presenting the previously presented arguments in substantially the same form. The Examiner points to the discussion in *Huang* that merely mentions the potential allocation of the transferee-candidate carrier as satisfying both claims' limitations. *See* Current Action, pg. 11. Applicant respectfully disagrees. *Huang*'s allocation of a carrier occurs, regardless of where in the band the transferee carrier may be operating and of the location of the subscriber, as long as the steps of Figures 7A and 7B are satisfied. In other words, either the call originating carrier or the second carrier (transferee-candidate) is selected, depending on the measured load levels of both carriers. *See Huang*, Figures 2, 3, 7A, and 7B. Similarly, there is no classification of subscribers into priority groups, let alone allocation based on such priority groups. Thus, *Huang* fails to disclose these limitations. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 17 recites "the power control units command at least one of the subscriber units to extend the power control range of the subscriber," and claim 19 recites "driving up or down subscriber transmit power depending on a location of the subscriber in relation to a base station." The Examiner asserts that *Huang*'s load measurer **14** discloses these limitations of claims 17 and 19. *See* Current Action, pg. 11. Further, the Examiner asserts that "measuring power are [sic] part and parcel of the modern communication system. It is an inherent part of the communication system to measure transmission/reception power." *See id.* at pg. 5 (emphasis added). It is unclear whether the Examiner is referring specifically to *Huang*'s communication system or generally to all communication systems. The Examiner failed to comply with the requirements for raising an inherency rejection because the Examiner has not shown that the allegedly inherent characteristic necessarily flows from the teaching of *Huang*.

Moreover, it is unclear how a system's capability to measure power relates to a command of whether to extend the power control range of the subscriber or driving up or down subscriber transmit power depending on a subscriber's location in relation to a base station.

Further, as discussed above, nothing in *Huang* indicates or suggests that the load measurer is capable of communicating with the subscriber, let alone commanding it to adjust its

power control range or having the transmit power driven up or down depending on the subscriber's location, as required by claims 17 and 19, respectively. Consequently, *Huang* fails to disclose these limitations. Therefore, Applicant requests withdrawal of the rejection of record.

VI. REJECTION UNDER 35 U.S.C. § 103(A)

Claims 2-3, 8-10, and 15-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Huang* in view of *Hess*.

In rejecting claims under 35 U.S.C. § 103, the Examiner bears the initial burden of establishing a *prima facie* case of obviousness. *In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984). The Examiner cannot satisfy this burden through "mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR Int'l. v. Teleflex Inc.,* 127 S. Ct. 1727, 1741, 82 USPQ 2d 1385, 1396 (2007) (citing *In re Kahn*, 441 F.3d 977, 988, 78 U.S.P.Q.2d 1329, 1336 (Fed. Cir. 2006)). In *KSR*, the United States Supreme Court affirmed the factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1 (1966), which must be considered in applying the statutory test: (1) determining of the scope and content of the prior art; (2) ascertaining the differences between the prior art and the claims at issue; (3) resolving the level of ordinary skill in the pertinent art, and (4) evaluate evidence of secondary considerations. Therefore, the rejection must address all the limitations of the claims. Moreover, the Examiner must provide analysis supporting any rationale why a person skilled in the art would combine the prior art to arrive at the claimed invention, and "[such] analysis should be made explicit," *KSR*, 127 S.Ct. at 1741. The Examiner has failed to at least show that the pending claims are obvious under the framework set out in *Graham*. That is, the Examiner has failed to address all the limitations of the claims and provide explicit analysis supporting any rationale that a person skilled in the art would combine the cited prior art. Therefore, Applicant requests that such rejections be withdrawn.

Applicant respectfully points out that the Examiner's proposed combination is inappropriate insomuch as it would change the principle operation of *Huang*. "If the proposed

modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious." *In re Ratti*, 270 F.2d 810 (C.C.P.A. 1959). If *Huang* and *Hess* were to be combined, *Huang* would be required to be modified to include *Hess*' received signal strength indicator **18**b. Moreover, it would be uncertain whether this new criteria of "received signal strength" for channel or carrier allocation would be incorporated prior to, after, or in lieu of the measurement of the load levels of the first and second carriers and the associated determinative steps, which would change the principle operations of *Huang* if not render it meaningless. Therefore, the suggested combination of *Huang* and *Hess* is improper and the rejection of claims 2-3, 8-10, and 15-16 should be withdrawn.

Failure to Satisfy Every Claim Limitation

1. Dependent Claims 2-3, 8-10, and 15-16

Claims 2-3, 8-10, and 15-16 stand rejected under 35 U.S.C. 103(a) as being unpatentable over *Huang* in view of *Hess*.

Each of the dependent claims 2-3, 8-10, and 15-16 inherits the limitations of the claims from which they depend. As shown above, *Huang* does not satisfy every limitation of the independent claims. *Hess* is not relied upon to satisfy the missing limitations, nor does it do so. As such, these dependent claims are patentable at least by virtue of the reasons set forth above with respect to their respective independent claims. Therefore, Applicant requests withdrawal of the rejection of record. Moreover, dependent claims 2-3, 8-10, and 15-16 set forth limitations making them patentable in their own right.

For example, claim 3 recites "selecting carriers closer to or at the center of the band when the subscriber is far away from the base station; and selecting carriers further away from the center of the band when the subscriber is close to the base station." The Examiner admits that *Huang* does not disclose this limitation and relies upon *Hess* as teaching this limitation. *See* Current Action, pgs. 14-15. The Examiner further asserts that "*Hess* discloses assignment of channels based on location. The received signal strength is an indicator of the location of the

subscriber unit. The closer the subscriber, the stronger the received signal strength, the farther away the subscriber unit, the weaker the received signal strength." *See id.* at pg. 5. The Examiner, however, fails to provide any citations to specific portions of *Hess* explaining the measured relative strength values actually correlate to the distance of the user. If the Examiner continues to assert that *Hess* discloses such correlation, Applicant respectfully requests the Examiner to cite to specific portions of *Hess* that explains this. Otherwise, under Rule 37 C.F.R. §1.104(d)(2), the Examiner is hereby requested to provide and make of record an affidavit setting forth his data as specifically as possible for the assertion. Alternatively, under M.P.E.P. §2144.03, the Examiner is hereby requested to cite a reference in support of the assertion. Accordingly, the combination of *Huang* and *Hess* fails to satisfy all the limitations of claim 3. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 8 recites "assigning a spectral priority code to the subscriber based on whether the subscriber is near to or far from the base station, and wherein carrier allocation occurs based on the spectral priority code." The Examiner has failed to address the arguments Applicant presented in the Response to the Non-Final Office Action dated July 22, 2008. As such, Applicant can only address this rejection by presenting the previously presented arguments in substantially the same form. In the Current Action, the Examiner admits that *Huang* does not disclose this limitation and relies upon *Hess* as disclosing this limitation. However, *Hess* describes giving priority to the calls in the hand-off queue ahead of the calls in the first assignment queue for efficient loading and minimized interference to active calls. *Hess*, col. 9, lines 3-18. There is no discussion in *Hess* regarding a subscriber's location with respect to the base station or a spectral priority code based on such location (*e.g.*, the priority of a subscriber over other subscribers in being assigned a carrier in a coverage area, based on the path loss or time delay of that subscriber as compared to the other subscribers). As shown, the Examiner's proposed combination fails to teach or suggest every claim limitation. Therefore, Applicant requests withdrawal of the rejection of record.

Claim 15 recites "the carrier allocator reallocates carriers closer to the center of the band when a subscriber moves farther away from the base station," and claim 16 recites "the carrier allocator reallocates carriers farther from the center of the band when a subscriber moves closer

to the base station." The Examiner has failed to address the arguments Applicant presented in the Response to the Non-Final Office Action dated July 22, 2008. As such, Applicant can only address this rejection by presenting the previously presented arguments in substantially the same form. In *Hess*, the channels are assigned first to candidates in the hand-off queue then ones in the first assignment queue, then back to the handoff queue and so on. There is simply no dynamic reallocation of carriers to subscribers as the subscribers move further or closer to the base station. As shown, the Examiner's proposed combination fails to teach or suggest every claim limitation. Therefore, Applicant requests withdrawal of the rejection of record.

VII. CONCLUSION

In view of the above, Applicant believes the pending application is in condition for allowance. Applicant submits herewith fees in the amount of $245 for petition for extension of time (two months). Please charge any additional fees required or credit any overpayment to Deposit Account No. 06-2380, under Order No. 68144/P020US.B/10505125during the pendency of this Application pursuant to 37 CFR 1.16 through 1.21 inclusive, and any other sections in Title 37 of the Code of Federal Regulations that may regulate fees.

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Respectfully submitted,

By 

Robert Greeson
Registration No.: 52,966
FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201-2784
(214) 855-8000
(214) 855-8200 (Fax)
Attorney for Applicant